

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

WALLY BORO,
Appellant.

No. 2 CA-CR 2018-0190
Filed September 26, 2019

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.19(e).

Appeal from the Superior Court in Pima County

No. CR20173246001

The Honorable James E. Marner, Judge

AFFIRMED IN PART; VACATED IN PART

COUNSEL

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STATE v. BORO
Decision of the Court

MEMORANDUM DECISION

Presiding Judge Staring authored the decision of the Court, in which Chief Judge Vásquez concurred and Judge Brearcliffe specially concurred.

S T A R I N G, Presiding Judge:

¶1 Following a jury trial, Wally Boro was convicted of promoting prison contraband, to wit, marijuana, and possession of marijuana weighing less than two pounds.¹ The trial court sentenced Boro to concurrent, minimum prison terms, the longer of which is four years, to be served concurrently with and consecutively to the sentences imposed in another matter.

¶2 Counsel has filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967), *State v. Leon*, 104 Ariz. 297 (1969), and *State v. Clark*, 196 Ariz. 530 (App. 1999), stating she has reviewed the record and has been unable to find any “arguably meritorious” issue to raise on appeal and asking us to search the record for fundamental error. Consistent with *Clark*, 196 Ariz. 530, ¶ 32, she has provided “a detailed factual and procedural history of the case with citations to the record.” Boro has not filed a pro se supplemental brief. In reviewing the record pursuant to *Anders*, we identified as a non-frivolous claim whether possession of marijuana is a lesser-included offense of promoting prison contraband, and if so, whether Boro’s conviction for possession of marijuana should be vacated. We ordered the parties to file supplemental briefs addressing this question. We vacate Boro’s conviction and sentence for possession of marijuana, but otherwise affirm.

¶3 Viewed in the light most favorable to sustaining the verdicts, see *State v. Delgado*, 232 Ariz. 182, ¶ 2 (App. 2013), the evidence is sufficient to support the jury’s findings of guilt, see A.R.S. §§ 13-2501(1), (2), 13-2505(A)(1), (G), 13-3405(A)(1), (B)(1). The evidence presented at trial showed that on July 9, 2017, during a body-cavity search of Boro that was part of the routine admissions process at the Pima County Jail, a corrections

¹ Although Boro was also charged with possession of drug paraphernalia, that charge was dismissed.

STATE v. BORO
Decision of the Court

officer discovered “a bag protruding out of [Boro’s] rectal area” which contained “0.86 grams, plus or minus 0.04 grams” of marijuana. Boro’s sentences are within the statutory range and were imposed in a lawful manner, except as corrected below. *See* A.R.S. § 13-702(D).

¶4 In his supplemental opening brief, Boro argues his conviction for possession of marijuana violates the constitutional prohibition against double jeopardy; the state agrees. Because Boro did not raise this issue below, a fact he impliedly acknowledges, we review his claim only for fundamental error. *See State v. Escalante*, 245 Ariz. 135, ¶ 12 (2018). A double-jeopardy violation constitutes fundamental error. *See State v. Jurden*, 239 Ariz. 526, ¶ 7 (2016). Therefore, we review de novo whether double jeopardy applies. *See State v. Brown*, 217 Ariz. 617, ¶ 12 (App. 2008).

¶5 A criminal defendant’s double-jeopardy rights are violated when the defendant is convicted both of an offense and a lesser-included offense, even if the defendant receives concurrent sentences. *See id.* ¶ 13. “[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.” *Blockburger v. United States*, 284 U.S. 299, 304 (1932). “[G]reater and lesser-included offenses are considered the ‘same offense’” for double-jeopardy purposes. *State v. Garcia*, 235 Ariz. 627, ¶ 5 (App. 2014).

¶6 Boro committed the offense of promoting prison contraband by bringing marijuana into the prison inside his rectum in violation of § 13-2505(A)(1), which provides: “[a] person, not otherwise authorized by law, commits promoting prison contraband . . . [b]y knowingly taking contraband into a correctional facility or the grounds of such facility.” Section 13-2501(1) defines contraband as “any dangerous drug, narcotic drug, marijuana . . . or other article whose use or possession would endanger the safety, security or preservation of order in a correctional facility” If the contraband is a dangerous drug, narcotic drug, or marijuana, § 13-2505(G) makes the offense a class two felony.

¶7 Boro was also convicted of possession of marijuana for possessing the same marijuana found in his rectum, in violation of § 13-3405(A)(1), which provides that “[a] person shall not knowingly . . . [p]ossess or use marijuana.” Promoting prison contraband requires proof of facts in addition to those required for possession of marijuana—specifically, that the defendant knowingly takes contraband, including

STATE v. BORO
Decision of the Court

marijuana,² into a correctional facility. Therefore, under the *Blockburger* test, the Double Jeopardy Clause was violated by convicting Boro of promoting prison contraband by bringing marijuana into the prison and of possessing the same marijuana, a lesser-included offense of promoting prison contraband. *State v. Cheramie*, 218 Ariz. 447, ¶ 9 (2008) (lesser-included offense is “composed solely of some but not all of the elements of the greater crime so that it is impossible to have committed the crime charged without having committed the lesser one.” (quoting *State v. Celaya*, 135 Ariz. 248, 251 (1983))).

¶8 Pursuant to our obligation under *Anders*, we have searched the record for fundamental, reversible error and have found none, save the conviction for the lesser-included offense of possession of marijuana. We vacate that conviction and sentence and affirm Boro’s conviction and sentence for promoting prison contraband.

B R E A R C L I F F E, Judge, specially concurring:

¶9 I concur in the result based on the state’s confession of fundamental error.

²See § 13-2501(1).